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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, Lester L. and Joyce Cruzan,
Appellants,

vs.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,

vs.

THAD C. McCANSE, Guardian ad litem,
Respondent

On Appeal from the Supreme Court of Missouri

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS BY JOHN E. McCONNELL, KATHLEEN McCONNELL HEWITT, JAMES McCONNELL, and AMY L.McCONNELL

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THE ISSUE PRESENTED AND THE POSITION OF THESE AMICI CURIAE

May a state's interest in the preservation of life override the wishes of a persistently vegetative patient and her loving parents-guardians to discontinue nutrition and hydration provided through a surgically implanted gastrostomy tube?

The court below held: "Yes". This brief submits that "No" was required.

Consents to the filing of this brief have been filed by the parties.

THE INTEREST OF THESE AMICI CURIAE

The instant amici are the husband and three children of Carrol M. McConnell, a patient in a persistent vegetative state (hereinafter "PVS") whose tube removal was finally effected through the decision of the Supreme Court of Connecticut early in

1989 (McConnell v. Beverly Enterprises, Inc., 209 Conn. 692, 533 A.2d 596).

These amici were gratified thus to accomplish the wishes which Mrs. McConnell had so clearly expressed as the nurse in charge of the emergency room at the Danbury Hospital in Connecticut. But they feel that they alone, among all the other amici curiae, understand the agony involved in such a case and the frustration of having it decided on unsought technical grounds of statutory interpretation which the patient would not have approved. She was an informed and determined person who would have wanted her long wait and her family's pain to have proclaimed a clear constitutional or common-law right to protect others in the future in similar situations.

Those rights were clearly proclaimed by the lower court's decision. However,

the Connecticut Supreme Court's affirmance echoed those rights only as dicta, which was soon characterized as follows (Connecticut Law Tribune, March 27, 1989, p. 13, by Prof. David S. Rosettenstein, University of Bridgeport School of Law):

> "By ducking the pivotal constitutional issue of whether the right to privacy precludes the legislature from forcing a patient to continue nutrition and hydration against her wishes, the court has condemned future patients to a slow and lingering death."

As in the case of Nancy Cruzan, the state's living will statute admittedly did not apply, yet the Court went off on statutory grounds. Before that decision came down, the family had agonized for four years and then faced a phalanx of determined right-to-life opposition which refused to recognize that a natural death at the end of life -- devoutly wished for

by the PVS patient -- is quite different from an interrupted pregnancy.

THE INSTANT FACTS

The details of Nancy Cruzan's medical history and condition are left primarily to the appellants' brief. For this brief, suffice it to say that the following facts are undisputed (with "pet. app." indicating the pages of the decision below as in the petition for certiorari's appendix):

1. Since her injury in an automobile accident on January 11, 1983, she has remained unconscious in a hospital, receiving "the totality of her nutrition and hydration through the gastrostomy tube" which was "surgically implanted" shortly "after the accident" (pet. app. 7).

2. "[T]he evidence is clear and

convincing that Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death" (id. 34).

3. Her parents, who are also her co-guardians, sued to have the gastrostomy tube removed, and the trial court granted their prayer (id. 5).

4. On appeal, the court below acknowledged "the loving family with which she is blessed" and "the anguish of these parents who have suffered terribly these many years" through an "interminable bedside vigil" (id. 10).

5. Nevertheless, the court below found itself better suited to decide this deeply personal question than her loving parents or the trial court which had heard the evidence.

Point I will detail her constitutional and common-law rights. Point II

will refute the holding of the court below that those rights are overriden here.

POINT I

THE DECISION BELOW DEPRIVED NANCY CRUZAN OF HER CONSTITUTIONAL AND COMMON-LAW RIGHTS.

A. Introduction

"There is a time to be born and a time to die" (Ecclesiastes 3:2). "Death, a necessary end, will come when it will come" Julius Caesar, II,ii,32). The nunc dimittis prays: "Lord, now lettest thou thy servant depart in peace" (Luke 2:29).

The court below denied these basics, which were fundamental long before modern technology made life-prolongation possible during perpetual comas. To do this, the court disregarded extensive philosophical, legal, theological, and medical authority -- all of which will now be reviewed as

part of the common background before turning to sections on the constitutional rights of privacy and religion and, finally, to the common-law right of personal autonomy.

B. The common background

Preliminarily and fundamentally, three facts must be emphasized:

First, the life involved in this case is that of an adult woman who has expressed her wish not to be sustained alive in a condition less than halfway normal, who can never live in any way other than in a perpetual coma sustained by a surgically implanted gastrostomy tube, and whose parents admittedly love her and, with great anguish, seek the last resort of releasing her from this.

Second, this case involves neither a

fetus which has had no opportunity to express such wishes (cf. Webster v. Reproductive Health Services, ___ U.S. ___ [1989]) nor a retarded person who has never had the capacity to do so (cf. In re Storar (52 N.Y.2d 363, 420 N.E.2d 266).

Third, as the court below conceded, Missouri's Living Will statute is not involved since "the law did not take effect until after Nancy's accident" and she "had not executed a living will" (pet. app. 29).

Nancy's verbal expression of her wishes is poignant and prescient for so young a woman and her parents. This Court may judicially note that it is commonplace to elderly people, who are more familiar with death, who fear it less, and who overwhelmingly express their wish that their lives not be protracted by technological means. In In re Quinlan,

the court stated its opinion that discontinuance of life-support -- of a patient in precisely the same PVS condition as Nancy Cruzan -- "should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice for themselves or for those closest to them" (70 N.J. 10, 355 A.2d 647, 664, cert. den. 429 U.S. 922 [1976]).

The instant court below found such courage and planning to be unacceptable. In so ruling, the court placed itself at odds with the decisions in 51 cases in 16 states when, after listing them, it said: "Nearly unanimously those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought" (pet. app. 10-1 and fn. 4).

Philosophical and legal recognition

of the right of the individual to be free from legal interference in matters involving his own body is widespread, especially where there is no other life involved (On Liberty, John Stuart Mill [1859]; Union Pacific Ry. v. Botsford, 141 U.S. 250 [1891]; Schloendorf v. Society of New York Hospital, 211 N.Y. 125 [1914]; Presidential Commission of 1983: "Deciding to Forego Life-Sustaining Treatment"; Guidelines On The Termination of Life-Sustaining Treatment, Hastings Center [1987]).-- **"Not so"**, said the court below.

Theological acceptance of these basics is contained in the pronouncements by two Popes in recent years that life need not be prolonged interminably by technological means (Pius XII in 1957 [quoted in Quinlan, 355 A.2d, at p. 658] and John Paul II in 1980 -- see Christian Century: "The Last Word -- Whose?", Sept.

16, 1981, by S. A. Wise). These edicts have just been given particularly relevant voice by Joseph Cardinal Bernardin, who heads the Roman Catholic Bishops' Committee on Pro-Life Activities, as follows (Origins, June 8, 1988, p. 56):

> "[W]e are not morally obligated to do everything that is technically possible. In other words, there are cases where we would not be obligated artificially to provide nutrition and hydration." -- **"Not so"**, said the court below.

Medical agreement with this, except for a few mavericks, also is clear (American Medical Association, official opinion of March 15, 1986 and brief amicus curiae, emphasis added; American Academy of Neurology, official position paper of April 21, 1988; both referred to below: pet. app. 35, fns 18 & 19):

> "Life-prolonging medical treatment includes medication and artificially or technologi-

> cally supplied respiration, nutrition or hydration...[I]t is not unethical in certain circumstances for a physician to comply with the request of a patient or surrogate to withdraw life-prolonging medical treatment." -- "**Not so**", said the court below.

All of the foregoing authorities have been cited to, and almost all have been quoted approvingly by, the courts in the following jurisdictions in cases authorizing feeding tube removals (with bold typed names being used in later citations):

McConnell v. Beverly Enterprises-Connecticut, Inc. (209 Conn. 692, 533 A.2d 596 [1989]);

Gray v. Romeo (697 F.Supp. 580 [Dist. Ct., R.I. 1988]);

In re Conservatorship of **Drabick** (200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. den. 109 S.Ct. 399 [1988]).

In re Joseph v. **Gardner** (534 A.2d 947 [Supreme Court of Appeals, Maine, 1987]).

Delio v. Westchester County Med. Ctr. (129 A.D. 2d 1, 516 N.Y.S.2d 677 [2nd Dept. 1987]).

In re **Peter** and In re **Jobes** (108 N.J., respectively at 365, & 394; 529 A.2d at 419, & 434 [1987]).

Brophy v. New England Sinai Hosp. Inc. (198 Mass. 417, 497 N.E. 2d 626, [1987]).

Hazelton v. Powhatan Nursing Home, Inc. (Cir. Ct., Fairfax Co., Va., No. CH 98287 [1986]), app. den. 6 Va. Cir. Ct. Op. [1987]).

Corbett v. D'Allessandro (487 So.2d 308 [Fla. Dist. rev. den. 492 So.2d 1331, 1986]).

The first state high court among these tube-removal cases is Brophy, where the court held (497 N.E.2d, at p. 633, detailed citations and analysis omitted):

> "The right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitional right to privacy."

These same principles have been applied to respirator patients (e.g. In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. den. 429 U.S. 922 [1976]; In re Eichner,

52 N.Y.2d 363, cert. den. 354 U.S. 858 [1981]; Foody v. Manchester Mem. Hosp. (40 Conn. Sup. 127 [1984]; and In re Farrell, 108 N.J. 335, 529 A. 2d, 404 [1987]).

C. The constitutional right of privacy

A keystone to the right of privacy is Griswold v. Connecticut, (381 U.S. 479), its precedents, its rationale, and, of course, the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Griswold is cited as controlling authority in many of the 51 cases named by the court below, including Quinlan (55 A.2d, at p. 663), Gray (697 F.Supp., at p. 584), Jobes (529 A.2d, at p. 451), and Corbett (487 So.2d, at p. 449). And McConnell's dicta showed that Griswold would have been controlling if statutory construction had not been relied on (553 A.2d, at p. 600).

Concededly, Quinlan is "the seminal case" (pet. app. 12), and its holding as to the PVS patient there involved was:

> "[T]he individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims...The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment...as to whether she would exercise it in these circumstances" (355 A.2d, at p. 664).

This Court declined to review Quinlan (429 U.S. 922; accord as to Eichner and Drabick). By ignoring this, and all of the foregoing authorities, the court below interposed itself into the dying process.

That interposition disrupted several personal relationships which our law has, historically, recognized as particularly protected: parent and child; patient and doctor; and believer and minister (as God's surrogate). Thus, it disregarded

Nancy's relationship with her parents, with her doctor, and with her God.

As shown by the court below, the trial court's decision allowing Nancy to die was based on her expression "in 'somewhat serious conversation' that if sick or injured she would not continue her life unless she could live 'halfway normally'" (pet. app. 8). Far beyond these stated fears, Nancy is suffering "cerebral cortical atrophy...irreversible, permanent, progressive and ongoing" (id.). She has no prospect but to die after an indeterminate period of unconsciousness.

To require her to continue in this way -- against her will, and that of her parents -- violates basic concepts of decency, due process, and the independence and individual freedom guaranteed to all citizens.

D. The constitutional freedom of religion

The court below specifically based its decision "on two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself" (id. 25, emphasis added). Thus religion was placed directly in issue, for "sanctity" means: "Holiness of life and character...a religious binding force" (Webster's International Dictionary, 3rd ed.)

In taking this position, the court arrogated to itself a greater knowledge of the sanctity of life than the theological authorities discussed above, greater concern for Nancy's well-being than her loving parents, and greater knowledge than the host of states which have decided similar cases in allowing life to end.

During the trial, Nancy's father testified that she was "independent" and

that, while she did not attend church regularly, she was "a member of the Methodist Church...she was a spiritual person" (R. 454).

That more than adequately meets the requirements of religious belief analyzed at length by this Court in United States v. Seeger (380 U.S. 185 [1965] -- see especially the quotations therein from the Vatican Council at p. 862, Rev. David Saville Muzzey at p. 862, and Rev. Paul Tillich at p. 865).

Manifestly, Methodism includes belief in the quotations above from Ecclesiastes and Luke. Almost every religion teaches that there is an afterlife, a Heaven, a Paradise, a Nirvana, a Realm of the Buddha, etc.; and each religion stresses the importance of aspirationally and bravely facing death. Extensive studies recognize the same (On Death and Dying,

Kubler-Ross, Macmillan Co., 1969).

George Washington's last words were: "I die hard but I am not afraid to go" (Bartlett's Quotations, 15th ed., 1980, p. 379). Deaf Beethoven died saying: "I shall hear music in Heaven" (Oxford Book of Death, 1983, p. 331). Winston Churchill proclaimed: "I am ready to meet my Maker" (id.). May the beliefs of such giants, or lesser people, be overriden by court enforced mechanical life-prolongation?

Do even the members of this Court trust some government official to decide this question for them rather than their loving families? Is the sacrament of the last rites now to be denigrated by technology and its masters? If legislatures and courts may not prevent contraception as widely practised, may they control the dying process which everyone must face? It is submitted that

such questions are rhetorical and require a "No" in answer.

The present issue did not arise suddenly with Quinlan in 1976, but was aptly and poetically framed in 1899 as set forth in the footnote below (The Complete Poems of Paul Lawrence Dunbar, Dodd, Mead & Co., 1948, p. 149).

THE RIGHT TO DIE

I have no fancy for that ancient cant
That makes us masters of our destinies,
And not our lives, to hold or give them up
As will directs; I cannot, will not think
That men, the subtle worms, who plot and plan
And scheme and calculate with such shrewd wit,
Are such great blund'ring fools as not to know
When they have lived enough.
Men court not death
When there are sweets still left in life to taste.
Nor will a brave man choose to live when he,
Full deeply drunk of life, has reached the dregs,
And knows that now but bitterness remains.
He is the coward who, outfaced in this,
Fears the false goblins of another life.
I honor him who being much harassed
Drinks of sweet courage until drunk of it, --
Then seizing Death, reluctant, by the hand,
Leaps with him, fearless, to eternal peace!

The decision appealed from denied Nancy and her parents their absolute rights for her thus to confront her Maker directly without being forced into this living limbo.

E. The common-law rights

The foregoing statements by Washington, Beethoven, and Churchill, and the rhetorical questions posed thereon, apply not only to religious freedom but also to the simple dignity of the individual's right to autonomy over his own body when no others can be affected thereby.

His common-law right to determine his own medical care has been described in the authorities already cited, e.g. from John Stuart Mill, to Union Pacific Ry (141 U.S. 250), to Eichner (52 N.Y.2d 363, cert. den. 354 U.S. 858), to the American Medi-

cal Association, to the American Academy of Neurology, to Gardner (534 A.2d 947), and to two Popes and Cardinal Bernardin.

The court below conceded: "Beyond the broad policy statement it makes... [Missouri's living will] statute is not at issue in this case" (pet. app. 29, matter in brackets added). Accordingly all common-law rights which inhere in such situations apply to and protect Nancy Cruzan and her parents.

The court disregarded this and all of the foregoing authorities through an astonishing claim: after conceding that a competent patient has the right to control her own medical treatment, the court ruled that this did not apply to an incompetent patient, no matter how carefully her views had been expressed beforehand:

> "[I]t is definitionally impossible for a person to make an informed decision -- either to consent or to refuse -- under hypothetical circumstances... [for] neither the benefits nor the risks of treatment can be properly weighed or fully appreciated" (id. 21.

This Court may also note judicially that a large proportion of dying patients become unconscious for some period, brief or longer, before their deaths. Under the foregoing claim, no matter what patients may have wished, and no matter how carefully they thought about the problem before expressing their wishes, they lose their rights at the instant when they become unable to act for themselves.

That contravenes the basic premise of the "living will" statutes enacted in 39 states and the District of Columbia in the 13 years since Quinlan. Small wonder that Judge Welliver's dissent below concluded that "The Missouri Living Will Act is a fraud on Missourians who believe we have

been given a right to execute a living will, and to die naturally, respectably, and in peace" (pet. app. 81). The foundation of that dissent is summarized in Brophy:

> The right of self- determination and individual autonomy has its roots deep in our history...We..shift...from the paternalistic view of what is 'best' for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved, whether that person is competent or incompetent ... A significant aspect of this right of privacy is the right to be free of nonconsensual invasion of one's bodily integrity" (497 N.E.2d, at pp. 633-4).

If affirmed, the decision below will frustrate the overwhelming desire of the citizenry for death with dignity unimpeded by new medical technology. Common-law rights may not be so lightly abrogated (Shaw v. Railroad Co., 101 U.S. 557, 565. 25 L.Ed. 892 [1890]).

POINT II

THE DECISION BELOW IMPROPERLY ASSERTED THE STATE'S RIGHT TO TO OVERRIDE THE PATIENT'S RIGHTS

Brophy's just-quoted rejection of state paternalism was followed at once by the recognition of "four countervailing state interests: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession" (497 N.E.2d, at p. 634).

The same four interests were recognized by the court below -- citing Brophy, no less -- and it then went on to say: "In this case, only the state's interest in the preservation of life is implicated" (pet. app. 25).

When Quinlan was quoted above for its recognition of the right of privacy and the need to allow the guardian to decide

about the termination of life-support (supra, p. 9), the following was intentionally omitted: "Ultimately there comes a point at which the individual's rights overcome the State's interest" (355 A.2d 644). -- "**Never so**", said the court below.

In responding thus, the court echoed the following (On Death and Dying, Kubler-Ross, Macmillan Co., 1975, p. 2):

> "It is inconceivable for our unconscious to imagine an actual ending of our own life here on earth, and if this life of ours has to end, the ending is always attributed to a malicious intervention."

Just such misattribution is shown by the finding by the court below that death would be "imminent only if she is denied food and water" (pet. app. 26) and the "abrogation of the state's parens patriae power...authorizes a guardian to cause the death of a ward unilaterally" (id. 42,

emphasis added).

But this missed the mark for two reasons. First, this is no unilateral euthanasia or unwilling-victim situation. The parents here clearly are loving. If they were not, a contrary rule could and should be applied. But life's general experience within devoted families is strongly against that, and it should not be placed as an automatic limitation on love.

Second, the court below misunderstood the theory of causation. That theory was discussed at length, during the McConnell trial (553 A.2d 596) -- where the plaintiffs' attorney was the author of this brief -- by John J. Paris, a Jesuit priest, whose extraordinary qualifications merit compression here, as follows (pp. 159-167 of that transcript):

-- he testified in Quinlan, Brophy, and Gray, among others;

-- he holds professorships in ethics, medicine, and community health at, respectively, Holy Cross College, the University of Massachusetts Medical School, and Tufts Medical School;

-- he has several post-graduate degrees and was a visiting scholar for one year at Yale Law School in medicine and constitutional law; and

-- he has been a consultant to the President's Commission of 1983, a reviewer of articles for the New England Journal of Medicine and the United States Senate Committee on Aging, the author of the 53 articles on this topic, and a person who gives about 50 lectures on it each year.

Father Paris first described the background of the issue as follows:

> "Hippocrates tells us under the definition of medicine. There are three rules. It's to alleviate suffering, to overcome disease where possible, and not to impose treatments on patients who are over-mastered by their disease" (T2 169-70).

> "I was involved in that [Quinlan] case...There was a great dispute about whether or not you can remove the respirator. And the first ruling of the Court was you could not because it would be the cause of the patient's death...[T]here's no greater moral justification required to stopping the treatment once begun than never having started it" (id. 171-2, emphasis and matter in brackets added).

Cross-examined as to whether the tube's "removal would cause her death", Father Paris testified to the following:

> "No, no. You misunderstand cause, Counsel. Cause is a technical term that we find in Aristotle's second book of ethics. [His] example...is if there was a serious storm last night and a tree was leaning over on your lawn, you put a big prop under it. The next day the tree surgeons come and tell you the tree roots have suffered

such damage there is no way for the tree to continue to survive. If you remove the prop and the tree falls over and dies, do you cause the death of the tree? No. The storm which put the tree in that condition did'" (id. 196-8, matter in brackets added).

"The cause of death is the condition that put the patient in the inability to function and required the imposition of an intervention to artificially do that...My answer to your question, Counsel, is no, removing the IV or the nutrition fluid does not cause the death of the patient" (id. 198).

Father Paris' testimony also bears directly on the repeated and stressed finding of the court below that Nancy Cruzan is "not terminally ill" (pet. app. 8, 6, 9, 26, 34). Father Paris explained the contrary as follows:

> "[P]rior to 1987 when we talked of terminal patients, when I testified about the care of terminally ill patients, when Quinlan was discussed as terminally ill, we included PVS patients. When I testified in Barber, no one questioned, no one challenged the argumentation

> about the appropriate care of the terminally ill patient. Then you got sort of Talmudic studies about terminally ill. What was imminent? And physicians very honestly testified we can't tell you how many days a terminally ill patient has...hours...weeks ...[or] years...there are categories of patients, ALS patients, who are terminally ill, who now survive for several years." (Transcript, at 186-7, matter in brackets added).

In short, the majority of the court below made its mind up on the outcome it wished in this case and then tailored the opinion to reach that result.

As shown in Judge Balckmar's dissent, this was done through the procedural device of breaking a tie by elevating a lower court judge for that specific purpose (pet. app. 82).

As expanded by Judge Higgins' dissent, this was then compounded by the newly created majority's "'public policy' bootstrapped from a statute that all

parties in this case, the trial judge, and the majority, agree has no application" (id. 77).

From the majority's opinion and the extraordinary dissents, it is clear that this case was dealt with below as a right-to-life case tracking the court's own decision in Webster, albeit that is not explicitly stated. The inappropriateness of that is eloquently and forthrightly shown by the decision in In re Requena (213 N.J. Super. 475, 517 A. 2d 886, 892, aff'd per curiam, 517 A. 2d 869 [1986], emphasis added):

> "One of the problems in the case before me is that there has been a tendency on the part of the Hospital to find a 'pro-life' versus 'anti-life' issue where one does not truly exist...This poor woman is not anti-life and her decision is not anti-life. She would dearly like to be well and to have a decent life. Unfortunately, a decent life is not hers to have....I suspect that part of

> the Hospital's insistence on what it perceives as a pro-life position in this case is a mistaken fall-out from the abortion controversy which is on-going in our society. The Hospital, whose values are premised as they are on the loving care of people, naturally (and, I think, properly) views abortion as a terrible evil. But abortion involves the active, direct, intentional termination of life by interfering in the processes of nature. The life taken is usually perfectly healthy. The fetus does not in any sense consent to what is done to it. None of those elements are present in Mrs. Requena's case. There is no sensible comparison to be drawn between the two situations."

Just so. Nancy Cruzan's parents would dearly love to have her restored to some sort of health. But that may not be. Due process and equal protection sink into the quicksands of the reasoning by the majority of the court below.

CONCLUSION

Constitutional and common-law rights may not thus be excised, particularly where they involve such personal matters as are in issue here.

The decision below should be reversed, and the trial court's decision reinstated.

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